Supreme Court, U.S.
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No. 10-1128

In The

Supreme Court of the United States

ANDROME LEATHER CORPORATION
Petitioner,

v.

CITY OF GLOVERSVILLE, ZONING BOARD OF APPEALS OF THE CITY OF GLOVERSVILLE, D. ROBERT ROBBINS JR., THOMAS RENDA, FRANCES MOSCONI, MARGARET RALBOVSKY, GARRISON SEELOW, DEBORAH ASHE, KELLY OCTIGAN, KAREN SMITH a/k/a KAT, MICHAEL CAPPARELLO, ABRAHAM SEROUSSI, COMMON COUNSIL OF THE CITY OF GLOVERSVILLE, ANTHONY J. CARUSO, MARIE A. SCHULTZ, FRANK A. CLEMENTE, ANTHONY P. CHRISTIANO, PAUL E. REID, MARYLOUISE R. MELE,
Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the Second Circuit erred in holding, in conflict with the decisions of the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits and this Court, that in an Olech "class of one" case, Equal Protection analysis requires the plaintiff to show an "extremely high degree of similarity" between comparators such that "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the bases of a mistake."

II

Whether the Second Circuit erred and encroached on the function of the jury by deciding that, whether the building inspector's action in denying petitioner's application to engage in the beaming process was intentional or a mistake, was an issue of law to be determined on summary judgment.

III

Whether the courts below erred as a matter of law in denying petitioner discovery on the issue of malice.

RULE 29.6 STATEMENT

Petitioner Androme Leather Corporation is duly incorporated as a corporation under the General Corporation Law of the State of New York, and there is no parent corporation and no publicly held corporation that owns any of the stock.

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INTRODUCTION

Plaintiff Androme Leather Corporation commenced this action pursuant to 42 USC 1983 against the code enforcement officer of the City of Gloversville, the Zoning Board of Appeals of the City of Gloversville, and the City of Gloversville for deprivation of Equal Protection under the "class of one" theory explained by this Court in Village of Willowbrook v. Olech, 528 US 562 (2000). Petitioner Androme established a genuine issue of material fact that the defendant code enforcement officer intentionally treated Androme differently than its competitor JBF when he denied petitioner the right to engage in the beaming process, but allowed JBF to beam, although under the zoning ordinance neither Androme nor JBF had a right to perform beaming. The defendants were granted summary judgment and Androme's complaint was dismissed because the Second Circuit has a higher standard that plaintiffs must meet on summary judgment in a "class of one" case than other Circuit Courts of Appeals. The First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted a standard of similarity between comparators like the standard set forth in Olech. This Court should grant certiorari in order to resolve the conflict between the Circuits, and to provide guidance to the Courts of Appeals for the application of "class of one" cases.

OPINIONS BELOW

The opinion of the Second Circuit is not officially reported but appears at 2010 WL 5027213 (2d Cir. 2010) and appears in appendix ("a") at 2a-5a. The opinion of the United States District Court, Northern District of New York (Suddaby, J.) is unreported and appears at appendix a at 6a–23a.

STATEMENT OF JURISDICTION

The petitioner seeks review of the decision of the United States Court of Appeals for the Second Circuit rendered on December 10, 2010. Appendix at 1a. The mandate issued on January 5, 2011. This Court has jurisdiction under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The United States Constitution, Amendment XIV, Section 1, known as the Equal Protection Clause, provides in pertinent part: "No state shall**** deny to any person within its jurisdiction the equal protection of the laws."

The following sections of the City Code of the City of Gloversville are set forth in the appendix at 24a et seq.: 300–50, 300–46, 102–19(C), 102–27(E), and 212–27(G).

STATEMENT OF THE CASE

Androme Leather (hereinafter "Androme") is a leather processing company with a plant located at 21 Foster Street in the City of Gloversville, New

York [A-129; A-1688]. JBF is a leather processing plant located at 41 West 11th Avenue in Gloversville, New York [A-180; A-1690; A-2138; A-2142].[1] The Androme leather processing plant and the JBF leather processing plant are located across the street from one another, approximately 300 feet apart, and both Androme and JBF are in the Sixth Ward in the City of Gloversville [A-180–A-181; A-938; A-959; A-1690; A-2142–A-2143]. Both Androme and JBF were located in the same M-1 zoning district[2] [A-959]. An M-1 zone does not allow any leather processing or any other use as of right and requires a special use permit for any use, unless the use is grandfathered [A-814].

Beaming, which involves removing hair from raw skins, is the first procedure in a five step process to treat leather for manufacturing use[3]. Up to 1998 Androme had not engaged in beaming, and JBF, although it had beamed in the 1970s and 1980s, had already lost its grandfathered right to engage in beaming because it had discontinued its beaming operation in 1988 for a period of ten years. The

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[1] References denoted "A" are to the pages in the Joint Appendix in the United States Court of Appeals for the Second Circuit.

[2] Initially both Androme and JBF were in an M-2 zoning district. In 1990 a zoning amendment changed the area's zoning to an M-1 zoning district. According to the General Code of Gloversville Section 300-11(A)(1), "There are no uses permitted by right within the M-1 Manufacturing District." [A-814].

[3] There are five steps in the process of treating an animal hide or animal skin: (1) beaming, which involves removing hair from the animal hide; (2) pickling, which involves pressing the hides for tanning; (3) tanning, which involves turning the hides into preserved pieces either using oils and chemicals; (4) coloring, which involves dying the leather; and (5) finishing, which involves applying paint to the face of the leather by using spray guns. [A-1683]

Zoning Code of the City of Gloversville provided that discontinuance of a non-conforming use for a period of 12 consecutive months results in the loss of the right to engage in the non-conforming use (loss of grandfathering status), and explicitly states that a non-conforming use may not be reestablished if the use is discontinued for a period of twelve (12) consecutive months. See Zoning Code, "Section 300-50 Discontinuance of Use. [A-832]

On October 10, 2000 Androme submitted a building permit application to defendant D. Robert Robbins, Jr., the City Building Inspector, "to add beaming process to present finishing and tanning plant." [A-131; A-597]. On October 12, 2000, defendant Robbins denied Androme's building permit application on the grounds that: "Article IV § 300-11 does not allow for treatment of leather in an M-1 zone" [A-131; A-597].

Androme subsequently applied to defendant Zoning Board of Appeals ("ZBA") for a review of defendant Robbins's interpretation of the zoning ordinance and, in the alternative, for a use variance to engage in beaming. [A-131; A-599-A-601]. The ZBA denied Androme's use variance application. [A-195; A-602-A-603]. In so doing, the ZBA made scant findings but determined that Androme had not shown the financial hardship necessary to obtain a use variance [A-40; A-48; A-195-A-196]. Androme subsequently filed an Article 78 proceeding in Supreme Court, Fulton County challenging the denial of Androme's application for a variance to perform beaming. Androme believed that the Article 78 proceeding would be successful because Androme had shown dollars and cents hardship [A-195]. In its final Decision and Judgment on March 29, 2002, the Supreme Court affirmed the ZBA's denial of the use

variance. Androme appealed the Supreme Court's determination to the New York State Supreme Court, Appellate Division, Third Department, and a decision was entered on November 6, 2003. See In the Matter of Androme Leather Corp. v. City of Gloversville et al., 1 A.D.3d 654 (3rd Dept. 2003). On February 12, 2004, the New York State Court of Appeals denied Androme's motion for permission to appeal. See In the Matter of Androme Leather Corp., v. City of Gloversville et al., 1 N.Y.3d 507 (2004).

After the Court of Appeals denied leave to appeal, Androme heard rumors from several sources that JBF had stopped beaming for more than one year and therefore had lost its grandfathered right to beam in the M-1 district [A-133; A-2252]. In light of this information, Androme authorized its attorney to investigate whether defendants had engaged in selective enforcement and thereby violated Androme's rights [A-133]. As part of that investigation, Androme's attorney made a request under the New York State Freedom of Information Law ("FOIL"), Public Officers Law § 84, et seq., to the Building Department of the City of Gloversville [A-133-A-134; A-144-A-146] and to the Gloversville-Johnstown Joint Wastewater Treatment Facility ("Joint Sewer Board") [A-134; A-148-A-149].

On July 28, 2004, the Joint Sewer Board responded to the FOIL request by providing documents pertaining to JBF and its leather processing plant [A-134-A-135; A-150]. Among the documents was a copy of a letter from Donald J. Wager, President, Met Leather, Inc., to Robert Robbins, Building and Plumbing Inspectors, dated May 10, 2001, which requested whether it would be "OK" to "resume" beaming upon purchase of JBF

leather plant. The letter from Mr. Wager states in full:

> "We are looking to purchase the JBF tannery at 41 West 11th Avenue in Gloversville and would like to resume the coloring, tanning, beaming and finishing process' that have been done there in the past.
>
> We are writing to you at the request of Rosemarie Knichel, the superintendent of Gloversville-Johnstown Joint Sewer Board because she needs a letter from you stating that it is OK to resume operations at JBF."

[A-151].

A copy of a letter-response from Robert Robbins, Jr., Building and Plumbing Inspector, City of Gloversville, to Donald J. Wager, President, Met Leather, Inc., dated May 15, 2001, which vaguely stated the regulations for zoning in the M-1 district, was also provided. Mr. Robbins' letter response states in full:

> "The above captioned leather processing plant is located in an M-1 zone. As such, it is a non-conforming use. Any leather process that was being done in 1990 when the zoning classification changed and has been done at some level since then, can still be done now.
>
> If operations cease for over one (1) year the non-conforming status of

> the property will be lost and leather processing will no longer be permitted.
>
> I trust this answers your inquiry. Please feel free to contact me if I may be of any further assistance to you in the matter."

[A-154].

Also among the documents provided was a copy of a letter from Rosemary Knichel, Superintendent, Industrial Waste Monitoring Program, for the Joint Sewer Board, to Robert Robbins, Jr., Building and Plumbing Inspector, City of Gloversville, dated June 12, 2001, requesting information for Michael DeMagistris[4], a potential new owner of JBF, regarding whether JBF/Tradition could resume beaming under the Gloversville zoning code. The letter from Ms. Knichel states in full:

> "Michael DeMagistris is in the process of purchasing the JBF Leather building. He has requested a Wastwater Discharge Permit in the name of Tradition Leather covering beaming, coloring, tanning and finishing form the Gloversville-Johnstown Joint Sewer Board effective when he becomes the owner.
>
> Please let the Gloversville-Johnstown Joint Sewer Board (Attention Rosemarie) know if this operation conforms to the Zoning Rules and Regulations of the city of Gloversville."

---

[4] Mr. DeMagitris subsequently purchased JBF from Mr. Frank Perella, and Mr. DeMagistris changed the name of the plant to Tradition Leather.

[A-152].

A copy of the letter-response from Robert Robbins, Jr., Building and Plumbing Inspector, City of Gloversville, to Rosemary Knichel, Superintendent, Industrial Waste Monitoring Program, of the Joint Sewer Board, dated June 15, 2001, which was a similarly vague response to Ms. Knichel's inquiry, was also provided. Mr. Robbins' letter-response states in full:

> "I trust that the JBF Leather building you refer to is the leather processing facility located at 41 West Eleventh Avenue. If this is the case, then the premises is located in an M-1 zone I the City of Gloversville. Any leather process that was being done when the M-1, M-2 zones were formed in the early 1990's and has been done at some level since then, can still be done now.
>
> If operations at the facility were to cease for over one (1) year, the nonconforming status of the property will be lost and leather processing will no longer be permitted.
>
> I trust this answers your inquiry. Please feel free to contact me if I may be of any further assistance to you in this matter."

[A-153].

During depositions, Androme learned that after defendant Robbins received the letters from Mr. Wager and Ms. Knichel regarding whether JBF could resume beaming, defendant Robbins had consulted with a his supervisor, Gary Lunkenheimer, to inquire if JBF had been was beaming [A-958-A-962; A-2182]. At that time both Lunkenheimer and Robbins reported to the City Engineer Lee Mitchell, who was their supervisor [A-915]. Lunkenheimer lived directly across the street from the JBF plant [A-957; A-2182]. When Robbins was asked what information he had about whether JBF was beaming, Robbins states: "A coworker of mine happens to live directly across the street, or at the time lived directly across the street from JBF." [A-957] Robbins is then asked: "What was the nature of the conversation?" Robbins stated: "Whether they had been beaming over the last several years." [A-958]. When asked: "Was that conversation occasioned by Mr. Wager's letter?", Robbins stated "I believe it was." [A-958].

Prior to receiving the files from the Joint Sewer Board, Androme had no reason to know or believe that JBF had ceased beaming during the 1990s, or that defendant Robbins knew or should have known that JBF had ceased beaming for more than one year and nevertheless had approved JBF's application to "resume" beaming [A-138]. As a result of that discovery, Androme conducted further investigations and learned that a scientific methodology existed based on an analysis of the chemicals discharged into the sewer system from JBF's factory, to determine whether JBF had or had not been beaming at a particular point in time [A-139]. As a result, Androme requested the Joint Sewer Board to examine its records of discharges

and permits for JBF and determine whether JBF had ceased beaming for more than year at any time after to the zoning change in 1990 [A-139].

On May 9, 2005 Joseph Cellary, Laboratory Director of the Gloversville-Johnstown Joint Wastewater Treatment Facility, wrote a letter to Christopher Garguilo stating that JBF had not engaged in beaming between 1988 and 1998 [A-139; A-155]. The letter states in full:

> "This is to inform you of our findings concerning your inquiry to activities, which occurred at JBF Industries in the 1990's. All of the information received indicates that between 1988 and November of 1998, only tanning, coloring and finishing processes were being performed at JBF Industries. The beaming process was not being done. In November of 1998, the owners of JBF requested and were granted conditional permission by the Joint Sewer Board to begin beaming of reptile skins. JBF's permits for 1999 and 2000 indicated that this beaming process, as well as the tanning, coloring and finishing processes, continued during those two years.
>
> Please contact me if you require any additional information."

[A-139; A-155] (emphasis added)

Mr. Cellary reaffirmed his conclusions that JBF had not been beaming between 1988 and 1998 at his deposition. Mr. Cellary stated, "A review of

the [Industrial wastewater discharge permits, inspection records and lab analysis log books] indicates that JBF/Tradition Leather was engaged in beaming between 1985 through a portion of 1987, and from 1999 to the present. ...Based soley upon the records of the Sewer Board, only tanning, coloring and finishing processes were being performed at JBF between 1998 to November of 1999." [A-863-A-864].

When Androme received Mr. Cellary's letter in May 2005, Androme learned for the first time that JBF had not engaged in beaming between 1988 and November of 1998, and therefore that JBF had lost its grandfathered right to beam [A-140; A-964; A-2252]. After receiving proof of the discriminatory treatment favoring JBF, Androme commenced this litigation by filing the summons and complaint in the District Court on June 10, 2005 [A-4].

After Androme had commenced litigation, on October 10, 2006 Androme's attorney interviewed a former owner of JBF, Mr. Daniel Hannis [A-143], who confirmed the scientific evidence that JBF had not engaged in beaming from 1988 to 1998, and had not engaged in beaming under the new owner from September 1997 to November 1999. Mr. Daniel Hannis and Mr. Robert Marshall purchased the JBF plant from Mr. Frank Perrella and owned and operated JBF from September 1, 1997 for a period of three (3) years and two (2) months until November 2000 [A-181; A-2138-A-2139; A-2143]. They bought the plant from Mr. Frank Perrella [A-181; A-2139].

Mr. Frank Parrella told Mr. Hannis that he had completely stopped beaming in the early 1990's due to the supply of already beamed sheepskins coming from Africa [A-181; A-2139; A-2143]. Both Mr. Hannis and Mr. Marshall state that when they

took over JBF there was no beamshop in operation [A-2143]. Mr. Marshall's affidavit states: "When we took over JBF, there was no beamshop in operation. Frank Perrella had only four old fiberglass paddles, and the beaming shop was covered with dust and was not set up. It looked like it had not been used in 20 years." [A-181; A-2139; A-2143].

Both Mr. Hannis and Mr. Marshall confirmed that during the first two years of their ownership of JBF they did not engage in any beaming [A-181; A-2139; A-2144]. Mr. Hannis' affidavit states: "During the first two years I owned and operated the plant, JBF did not do any beaming. Based on my personal knowledge there was a period of at least four (4) years when the JBF plant did not to [sic] any beaming. These four (4) years when there was no beaming were at least two (2) years before I purchased the plant, and two (2) years after I purchased the plant." [A-2139–A-2140]. Mr. Marshall also stated that JBF did not do any beaming during the first two years they owned the plant [A-2145].

Mr. Robert Marshall confirmed that he had a personal conversation with defendant Robert Robbins in September 1999, and he told Mr. Robbins that JBF had not been beaming and requested to resume beaming [A-2142]. Mr. Marshall's affidavit states:

> "I told Mr. Robbins that the plant had not been beaming, and that we planned on beaming some deerskins that fall. We wanted to start with the beginning of the dear [sic] season in late November. I specifically remember telling Mr. Robbins that we wanted to start beaming in November in at least

> one, and possibly two, phone conversations. Mr. Robbins said he would have Rosemarie call me. He also said he wanted to know whether we were going to be beaming."
>
> [A-2145].

In a subsequent affidavit, Mr. Robbins claimed that he had "no recollection" of speaking with Mr. Marshall, but he did not deny that the conversation recounted by Mr. Marshall had occurred [A-2245].

Based on the letters requesting to "resume" beaming at the JBF facility [A-151–A-152], the records and investigation of Mr. Joseph Cellary [A-155-A-158], and the statements made by the previous owners of JBF [A-180; A-2138-A-2140; A-2142-A-2145], JBF should have lost its grandfathered right to engage in beaming in the M-1 zoning district because JBF was not beaming from 1988 to 1998 [A-964; A-2252]. Yet, after making a request to defendant Robert Robbins to resume beaming, JBF was allowed to engage in beaming [A-2145-A-2146]. Androme, a similar leather processing plant located in the same zoning district, made a similar request to engage in beaming but was denied such right [A-82-A-84; A-597-A-605]. The timeframe during which the City's Building Inspector denied Androme's application to engage in beaming and allowed JBF to "resume" beaming was approximately the same [A-604; A-608; A-611]. [5]

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[5] According to plaintiff's economic expert, Androme has lost more than $6,000,000.00 in leather processing business to its competitors because it can not perform the beaming process.

The District Court judge held that Androme and JBF did not have the "high degree of similarity" required for the equal protection claim to survive summary judgment because Androme had never engaged in beaming prior to the 1988 rezoning, whereas JBF had engaged in beaming prior to 1988, and because the City building inspector had discretion to assume that Androme was entitled to beam. The District Court judge held that Androme had introduced admissible record evidence from which a rational fact finder could conclude that the City building inspector was aware that JBF was not beaming for more than a year and failed to investigate that fact, and therefore Androme failed to establish that it was intentionally treated differently from JBF. Finally, the District Court judge found that there was no admissible record evidence establishing that defendants denied Androme a permit or variance to engage in beaming based on personal dislike or impermissible motive.

The Second Circuit stated that in a "class of one" Equal Protection claim the plaintiff is required to demonstrate that they share an "extremely high degree of similarity" with the person to whom they compare themselves, and that "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake." The Second Circuit held that Androme and its comparator JBF differed in at least one important respect, that is, JBF had at one point enjoyed a grandfathered right to engage in the process of beaming, whereas Androme had never enjoyed such a right to beam and applied to obtain a use variance from the zoning ordinance. The Second Circuit states that by itself ".....this difference raises 'the

possibility that the defendant acted on the basis of a mistake,' negating an essential element of the 'class of one' claim and rendering appropriate of an award of summary judgment to the defendants."

REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURTS OF APPEALS HAVE BECOME DIVIDED OVER WHETHER BUSINESSES WHICH HAVE BEEN TREATED UNEQUALLY BY GOVERNMENT MUST MEET A HEIGHTENED STANDARD OF PROOF OF EXCLUDING THE POSSIBILITY THAT THE DEFENDANT ACTED ON THE BASIS OF MISTAKE IN ORDER TO SURVIVE A SUMMARY JUDGMENT MOTION IN AN OLECH "CLASS OF ONE" CASE.

In the Village of Willowbrook v. Olech, 528 US 562 (2000), this Court recognized a successful claim under the Fourteenth Amendment's Equal Protection Clause brought by a "class of one" where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment [id. 564]. The majority of this Court noted that the allegation of intentionally treating similarly situated property owners differently, "quite apart from the Villages subjective motivation", was sufficient to state a claim for relief under traditional Equal Protection analysis. This Court found that it was unnecessary to reach the alternative theory of "subjective ill will" relied upon by the lower courts in Olech [id 565].

In Engquist v. Oregon Department of Agriculture, 553 US 591 (2008), this Court

acknowledged that recognition of the class-of-one theory in Olech was an application of the principle that the Equal Protection Clause is concerned with the arbitrary government classification, and that, when those who appear as similarly situated are treated differently, the Equal Protection Clause "requires a rational basis for the difference in treatment" [id. 602]. The Court noted that what was significant in Olech was "the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed", and there was no indication that the municipality was exercising discretionary authority based on subjective, individualized determinations [id. 602-603]. Some forms of state action by their nature involve discretionary decision-making based on a large number of subjective and individualized assessments, and these actions do not lend themselves to "class of one" equal protection analysis. Therefore, the Olech type "class of one" analysis does not apply to some classes of cases such as public employment disputes, which are often based on subjective and individualized decisions involving close relationships, personality conflicts, and other discretionary factors. Public employees are still protected against discriminatory effects based on impermissible classifications under traditional Equal Protection concepts, but public employment litigation is excluded from the "class of one" Olech theory [id. 604-605, 607-608]. While excluding public employment cases, this court in Engquist indicated that zoning and licensing decisions were of a type of "arm's-length" government regulation where Olech "class of one" Equal Protection analysis is applicable [id. 604-605].

In petitioner's case, there is an "arm's-length" zoning decision about whether two competing businesses located across the street from each other should be allowed to engage in the same prohibited conduct that is, beaming or removing hair from animal hides during leather processing.

Androme and JBF/Tradition Leather are similarly situated. They were both leather processing plants. They are both located on the same block, across the street from one another. They were both in the same zoning district, which was re-zoned to M-1 and did not allow beaming. In 2000 and 2001, both had no right to beam. Subsequently, they both wanted to start beaming. Both made their request to engage in beaming within the same time frame, and therefore both requests were made to the same code enforcement officer [A-972]. No legitimate distinguishable regulatory factors exist that might justify treating Androme differently than its neighbor on these facts.

- Both Androme and JBF/Tradition Leather are leather processing plants. [A-129; A-180; A-1688; A-1690]
- JBF/Traditional Leather is located across the street from Androme's premises at 41 West 11th Avenue, approximately 300 feet away, and both properties are located on the same block in the City of Gloversville's Sixth Ward[6] [A-180–A-181; A-1690; A-2142–A-2143].

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[6] All told, excepting Androme, there are at least nine (9) other leather processing businesses located within 1,500 feet of the premises in the Sixth Ward of the City of Gloversville, at least five (5) of which engage in beaming. With the exception of Tradition Leather (formerly JBF), the other leather processors

• Both Androme Leather and JBF/Tradition Leather are located in the same zoning district. [A-180 - A-181; A-938; A-959]

• In 1988, a zoning amendment changed the area's zoning to an M-1 Manufacturing District, and in an M-1 district beaming constitutes unpermitted use. Androme Leather Corp. v. City of Gloversville, 1 AD3d 654, 656 (3d Dept. 2003) [A-938; A-1013-A-1014].

• In 2000 and 2001 both Androme and JBF/Tradition had no right to beam at their facilities.

• In 2000 and 2001 both Androme and JBF/Tradition made requests to defendant Robbins to engage in beaming [A-972].

For these reasons, there is a high degree of similarity between Androme Leather and JBF/Tradition Leather which meets the test in Olech.

In 2000 and 2001 both Androme and JBF/Tradition made requests to Code Enforcement Officer, the defendant Robbins, to engage in beaming. There is a high degree of similarity between both of these leather processing plants, and the distinctions sought to be drawn between them are meaningless.

The argument that Androme and JBF/Tradition fall under different statutes is misplaced. In the years 2000 and 2001 both Androme and JBF/Tradition were in the same M-1

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in Androme's neighborhood that are engaged in beaming are grandfathered to conduct beaming [A-33–A-34; A-57–A-58; A-1000–A-1007].

zoning district in which any leather processing (including beaming) was not a permitted use, and both Androme and JBF/Tradition did not have a right to beam. The reason why both Androme and JBF/Tradition had no right to beam -- that Androme never had a right to beam, and that JBF/Tradition had lost its right to beam by cessation of use for more than 12 months -- is irrelevant. Whether Androme or JBF/Tradition had a right to beam in the decades before 2000 was ancient history, what is relevant is that in 2000 and 2001 both had the same status, with no right to beam.

At the time both Androme and JBF/Tradition wished to start beaming, in the years 2000 and 2001, neither had a constitutionally protected right. Both Androme and JBF/Tradition should have been treated equally and required to apply to the Code Enforcement Officer, and the Code Enforcement Officer should have treated them equally. Both Androme and JBF/Tradition should have been allowed to engage in beaming, or both should have been required to apply to the Zoning Board of Appeals and be subject to the same statutory requirements to obtain a use variance under New York's General City Law 81-b(3)(b). The identical statutes governed the rights of both Androme and JBF/Tradition to engage in beaming.

The argument that defendant Robbins had discretion in determining whether JBF/Tradition had lost its grandfathered status is completely erroneous because the statutes governing loss of a nonconforming use are mandatory and based on objective criteria which leave no room for discretion. Gloversville Zoning Code 300-50 entitled "Discontinuation of use" provides that discontinuance of a nonconforming use for a period

of 12 consecutive months' results in automatic loss of grandfathered status. Section 300–50 provides:

> A use shall be deemed to have been discontinued under any of the following conditions:
>
> A. Vacancy of a nonconforming use building or discontinuance of a nonconforming use for a period of 12 consecutive months.
> B. Manifestation of a clear intent on the part of the owner to abandon the nonconforming use."

[A-832]

The Gloversville Zoning Code provides for two methods whereby the status as a nonconforming use shall be lost, either (A) ".....discontinuance of nonconforming use for a period of 12 consecutive months," or (B) "Manifestation of the clear intent on the part of the owner to abandon the nonconforming use." Grandfathered status is lost when either ("any of the following conditions") criterion is met. Determining whether a constitutionally protected nonconforming use was lost under the second method of losing nonconforming status, (B) the owner manifesting a clear intent to abandon the nonconforming use, might involve some discretion and interpretation of the owner's intent. However, determining whether a nonconforming use was lost under the first method (A) discontinuance of the nonconforming use for a period of 12 consecutive months, is based on an objective criteria, JBF Tradition lost its non-conforming right to beam under the first method listed in the statute, (A)

discontinuance for a period of 12 months, an objective event which leaves no room for discretion. Under either alternative method of losing grandfathered status, under Section 300-50 the loss of nonconforming status is mandatory because the use "shall be deemed to have been discontinued."

New York State zoning law is clear that statutes providing for loss of protected status as a legal nonconforming use upon discontinuance of use for a period of 12 months are constitutional, and that such a loss of protected status is automatic and involves no exercise of discretion. Numerous New York precedents establish that the exact same language appearing in the Gloversville Zoning Code 300–50(A), ".....discontinuance of a nonconforming use for a period of 12 consecutive months", is an objective criterion that involves no exercise of discretion by the zoning officer and is automatic upon the occurrence of discontinuing the use for the specified period. Marzella v. Monroe, 123 A.D.2d 866 (2nd Dept. 1986), modified 69 NY2d 967 (1987); Prudco Realty Corp. v. Palermo, 96 AD2d 837 (2nd Dept. 1983), aff'd 60 N.Y.2d 656 (1983); Matter of Sun Oil Co. v. Board of Zoning Appeals, 57 A.D.2d 627 (2nd Dept. 1977), aff'd 44 N.Y.2d 995 (1978); Sapakoff v. Town of Hague Zoning Board of Appeals, 211 A.D.2d 874 (3rd Dept. 1995), appeal on constitutional grounds dismissed, 85 N.Y.2d 923 (1995); EPG Associates v. City of Ithaca Board of Zoning Appeals, 257 A.D.2d 744 (3rd Dept. 1999); New Venture Realty v. Fennell, 210 A.D.2d 412 (3rd Dept. 1994); Frammor Realty Corp. v. Leboeuf, 201 Misc. 220, (SC Nassau Co. 1951), aff'd 279 A.D. 795 (2nd Dept. 1952).

JBF/Tradition lost its grandfathered status to engage in beaming under section 300-50(A) as a

result of discontinuance of a nonconforming use for a decade from 1988 to 1998, as well as for a period of more than 12 consecutive months from September 1997 to November 1999 during the time frame when Daniel Hannis and Robert Marshall, who gave affidavits in opposition to summary judgment that they did not engage in beaming, owned the plant. The discontinuance provision in Gloversville Zoning Code 300–50(A) is identical to the language in numerous cases which have held grandfathered status is lost automatically upon discontinuance of the nonconforming use for the required time period. Where the zoning ordinance provides that the mere discontinuance of use of the property for a specified period constitutes a discontinuance, an intent to abandon a prior nonconforming use by the owner need not be established. See Marzella v. Monroe, supra, 123 AD2d at 866.

The Gloversville Zoning Code is also incandescently clear that, as a result of the two-year ownership by Mr. Hannis and Mr. Marshall when there was no beaming at the plant, JBF definitively lost its protected nonconforming use by operation of law. Gloversville Zoning Code 300-50 provides:

> "A nonconforming use of a building or structure or any portion thereof which is discontinued for a period of 12 consecutive months shall not be reestablished, and any subsequent use shall conform" [A-832]

Similarly, Gloversville Zoning Code 300-46 provides:

> "If a nonconforming use of land is discontinued for a period of 12

> consecutive months, it shall not be renewed, and any subsequent use of the land shall conform to the regulations of the district in which the land is located."
>
> [A-831]

This language leaves no room for discretion or interpretation. The mere discontinuance of beaming at JBF/Tradition from September 1997 to November 1999, during the time frame when the plant was owned by Mr. Hannis and Mr. Marshall, resulted in termination of the prior nonconforming use, and therefore JBF/Tradition was prohibited from engaging in beaming because it was located in the M-1 zoning district in which beaming was not a permitted use. In other words, during the years 2000 and 2001 Androme Leather and JBF/Tradition Leather were in exactly the same position, neither Androme nor JBF/Tradition had a right to engage in beaming.

In September 1999 Mr. Marshall personally told the defendant Robbins that JBF had ceased beaming for more than two years during his ownership of the plant from 1997 to 2000 [A-2142-A-2145] and Robbins knew that JBF had lost its grandfathered status to beam.

The defendant Robbins had no discretion to treat Androme Leather differently from JBF/Tradition Leather, because the two leather processing plants were in all relevant respects similarly situated. The defendants' reliance on Engquist in the court below is misplaced because under the Gloversville Zoning Code the Code Enforcement Officer had no discretion to treat them

differently. Both entities made the same simple request to begin beaming. The defendant Robbins should have either granted both Androme's request and JBF/Tradition's request to engage in beaming, or denied both requests to beam.

A. THE MAJORITY OF THE COURTS OF APPEALS HAVE HELD A PLAINTIFF IN AN OLECH "CLASS OF ONE" CASE MUST BE SIMILAR OR COMPARABLE IN ALL RELEVANT RESPECTS,BUT THE SECOND CIRCUIT HAS REQUIRED THAT THE SIMILARITY IN CIRCUMSTANCES AND DIFFERENCE IN TREATMENT BE SUFFICIENT "TO EXCLUDE THE POSSIBILITY THAT THE DEFENDANT ACTED ON THE BASIS OF MISTAKE".

The majority of the United States Circuit Courts of Appeals have followed the logic of this Court in the Olech and Engquist decisions, and have interpreted the Olech "class-of-one" theory as an application of the equal protection clause to situations where there is only one comparator, rather than a group or classification of comparators. The Courts of Appeals in the First, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted the standard employed by this Court in Olech for the degree of similarity between comparators required in a "class of one" Equal Protection case. These circuit courts, except for the Second Circuit, have required that in order for the "class of one" theory to apply, the plaintiff and the comparator must be "similar in all material respects" or equivalent language. Rectrix Aerodome Centers Inc. v. Barnstable Municipal Airport Commission, 610 F3d 8, 16 (1st Cir. 2010) (identity of entities and

circumstances to a high degree); Renchenski v. Williams, 622 F3d 315, 337-338 (3d Cir. 2010) (treated differently from persons who were similarly situated); Highway Materials Inc. v. Whitemarsh Township, 386 Fed.Appx. 251, 2010 WL 2680996 (3d Cir. 2010) (treated differently from other similarly situated landowners); Mann v. Brenner, 375 Fed.Appx. 232, 2010 WL 1220963 (3d Cir. 2010) (treated differently than other similarly situated individuals); Aldridge v. City of Memphis, 2010 WL 5158411 (6th Cir. 2010) (intentionally treated differently from others similarly situated); Rondigo, LLC v. Casco Township, 330 Fed.Appx 511, 2009 WL 1362390 (6th Cir. 2009) (relevant similarity); Franks v. Rubitschun, 312 Fed.Appx 764, 2009 WL 440364 (6th Cir. 2009) (intentionally treated differently from others similarly situated); LaBella Winnetka Inc. v. Village of Winnetka, 628 F3d 937, 942 (7th Cir. 2010) (identical or directly comparable in all material respects, or very similar indeed); Reget v. City of La Crosse, 595 F3d 691, 695 (7th Cir. 2010) (identical or directly comparable in all material respects, or very similar indeed); Srail v. Village of Lisle, Illinois, 588 F3d 940, 945 (7th Cir. 2009) (prima facia identical in all relevant respects); Hanes v. Zurick, 578 F3d 491, 494 (7th Cir. 2009) (intentionally treated differently from others similarly situated); Purze v. Village of Winthrop Harbor, 286 F3d 452, 456 (7th Cir. 2002) (prima facie identical in all relevant respects); Gallagher v. Magner, 619 F3d 823, 839 (8th Cir. 2010) (intentionally treated differently from others similarly situated); Flowers v. city of Minneapolis, 558 F3d 794, 799 (8th Cir. 2009) (intentionally treated differently from others similarly situated); Paul v. City of Sunnyside, 2010 WL 5034159 (9th Cir. 2010) (intentionally treated

differently from others similarly situated); Travis v. Park City Municipal Corporation, 565 F3d 1252, 1257-1258 (10th Cir. 2009) (intentionally treated differently from others similarly situated); Mimics Inc. v. Village of Angell Fire, 394 F3d 836, 849 (10th Cir. 2005) (treated differently than those similarly situated); Grider v. City of Auburn, 618 F3d 1240, 1265 (11th Cir. 2010) (prima facie identical in all relevant respects); Griffin Industries Inc. v. Irvin, 496 F3d 1189, 1203 (11th Cir. 2007) (similarly situated requirement must be succinctly stated and at a high order of abstraction; challenged governmental decisions are ultimately one dimensional and involve a single answer to a single question); Campbell v. Rainbow City, 434 F3d 1306, 1315 (11th Cir. 2006) (prima facie identical in all relevant respects); Tate v. District of Columbia, 627 F3d 904, 910 (D.C. Cir. 2010) (intentionally treated differently from others similarly situated).

The Second Circuit has adopted a higher standard of proof for plaintiffs to survive summary judgment in Olech "class of one" cases. In Neilsen v. DeAngelis, 409 F3d 100, 104 (2d Cir. 2005), the Second Circuit held that in order to succeed on a "class of one" claim, a plaintiff must establish that no rational person could regard the circumstances of the plaintiff to differ from those of the comparator and that the similarity and circumstances are "sufficient to exclude the possibility that the defendants acted on the basis of mistake". The Second Circuit set forth its Olech test in the following language:

> "(i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake."

Neilsen v. DeAngelis, supra, 409 F3d at 104

The Second Circuit has repeatedly held that the standard of proof a plaintiff must meet set forth in Neilson v. DeAngelis in an Olech "class of one" case continues to be valid, although the decision in Neilson v. DeAngelis itself has been abrogated on other grounds [see Appel v. Spiridon, 531 F3d 138 (2d Cir. 2008)]. The Second Circuit has repeatedly held that in order to survive summary judgment a plaintiff in a "class of one" case must establish that there is an "extremely high degree" of similarity between comparators and that "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake". Clubside Inc. v. Valentin, 468 F3d 144, 159 (2d Cir. 2006); Ruston v. Town Board for the Town of Skaneateles, 610 F4d 55, 59-60 (2d Cir. 2010); Analytical Diagnostic Labs Inc. v. Kusel, 626 F.3d

135, 140 (2d Cir. 2010). The Second Circuit has specifically stated that the holding in Neilson v. DeAngelis "including its articulation of the elements of a class-of-one claim equal protection claim, remain intact." Analytical Diagnostic Labs, supra, 626 F.3d at 140 fn. 1. The holding of the Second Circuit affirming the granting of summary judgment and dismissing the petitioner Androme Leather's case, based on this heightened standard, in the face of the evidence that the defendant Robbins knew JBF had lost its grandfathered status to beam, confirms that the Second Circuit continues to deviate from the other Circuit Courts of Appeals.

B. THE HEIGHTENED STANDARD TO SURVIVE SUMMARY JUDGMENT IMPOSED BY THE SECOND CIRCUIT UNDERMINES OLECH, VIOLATES THE SUMMARY JUDGMENT STANDARD IN FRCP 56, INFRINGES UPON A PLAINTIFF'S RIGHT TO A JURY TRIAL, AND DEPRIVES BUSINESSES OF A LEVEL PLAYING FIELD IN COMMERCE.

This Court should grant the petition for certiorari in order to settle the conflict between the Second Circuit and the other Circuit Courts of Appeals and to provide a definitive statement for the Circuits as to the correct standard a plaintiff must meet in an Olech "class of one" case.

The plaintiff Androme established by admissible evidence through the affidavit of Robert Marshall, a former owner of JBF, that in September 1999 he had personally told the defendant Robbins on several occasions that JBF had not been beaming

for more than two years, and that he and co-owner Daniel Hannis wanted to start beaming again [A–2142, A-2145]. Although in a subsequent affidavit Mr. Robbins claimed that he had no recollection of these conversations, the defendant Robbins did not deny the conversations as recounted in Marshall's affidavit had occurred [A–2245]. The affidavit of Mr. Marshall, together with other evidence that Robbins knew JBF had lost its grandfathered status to engage in beaming, was more than sufficient to establish that the Code Enforcement Officer's different treatment of Androme and JBF was knowing and intentional action.

Even the District Court acknowledged that "Here, Plaintiff [Androme] has introduced admissible record evidence from which a rational factfinder could conclude that Defendant Robbins (1) was aware JBF was not beaming for more than a year, and (2) failed to investigate this fact." [See 17a]. The evidence submitted by Androme was more than sufficient to establish a prima facia case that Robbins intentionally treated Androme less favorably than JBF, because the Code Enforcement Officer knew that JBF had lost its grandfathered status to beam yet he treated Androme differently. Under the usual standard for summary judgment in FRCP 56, petitioner's showing of intentional conduct by the defendant Robbins was more than enough to create a genuine issue of material fact.

The heightened standard of similarity of comparables developed by the Second Circuit, that the plaintiff must exclude the possibility of mistake, goes far beyond the usual requirement of showing that the defendant's action was intentional, a standard petitioner Androme clearly met. The requirement of the Second Circuit, that the plaintiff

eliminate the possibility that the defendant acted on a mistake, rather than intentionally, imposes a higher burden of proof on the plaintiff in the summary judgment stage in an Olech case. The issue of whether particular conduct by a defendant was intentional or a mistake is classically an issue of fact. By imposing a higher of standard of proof in an Olech type "class of one" case, the Second Circuit is going beyond the requirements of FRCP 56 and depriving plaintiffs of their right to have a jury determine the facts under the Seventh Amendment.

Finally, the heightened standard plaintiffs must meet in order to survive summary judgment in an Olech type case severely limits the protections against arbitrary action by government officials for millions of businesses and individuals within the Second Circuit. As this Court discussed in its decision, the Olech "class of one" type case is simply an application of the standard Equal Protection principle, that persons who are similarly situated should be treated equally, even where there is only one comparator if there is no rational difference between their circumstances. It is difficult to prove a negative. The corporations and individuals in the Second Circuit will largely be deprived of protection in "class of one" cases if plaintiffs must not only prove intentional action by the government, but also absence of mistake, at the summary judgment stage.

All persons should have a level playing field when it comes to enforcement of the Equal Protection clause, and there should be no exception for persons with "class of one" claims who happen to reside in the geographic boundaries of the Second Circuit. Accordingly, it is respectfully submitted that this Court should grant the petition for certiorari in order to resolve the conflict between the

Second Circuit and other Circuit Courts of Appeals, and define the degree of similarity required in Olech claims.

C. IF A SHOWING OF MALICE IS GOING TO BE REQUIRED IN OLECH TYPE CASES, PLAINTIFFS SHOULD HAVE BEEN ALLOWED DISCOVERY ABOUT THE MOTIVATION OF GOVERNMENT DECISION-MAKERS.

The courts below abused their discretion when denying plaintiff permission to depose Wager, DeMagistris, Mitchell, Lunkenheimer and LaPorta because defendant Robbins, the Code Enforcement Officer, spoke to each of these individuals regarding JBF/Tradition's request to beam. Generally, the district court's refusal to allow additional discovery prior to determination of motion for summary judgment is reviewed for abuse of discretion. Brown v. City of Syracuse, 1997 Fed. Appx. 22, 26 (2d Cir. 2006). Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955, 961 (2d Cir. 1996). Burlington Coat Factory Warehouse Corp. v. Espirit De Corp., 769 F.2d 919, 925 (2d Cir. 1985) *citing* Landmark Land Co., Inc., v. Spraque, 701 F.2d 1065, 1070 (2d Cir. 1983).

Androme has offered evidence that defendant Robbins spoke with each of these five (5) nonparty witnesses regarding his decision to permit JBF to engage in beaming, while denying Androme's request to engage in beaming, and that these conversations may offer evidence of Robbins' knowledge that JBF had ceased beaming operations for a period of one year, and malice by defendant Robbins or the ZBA.

Evidence shows the conversations between defendant Robbins of these witnesses were relevant and material and necessary to establish malice on the part of the Code Enforcement Officer when he made the decision to deny Androme beaming. Evidence of Robbins' malice would have satisfied the Second Circuit's heightened standard of proof for surviving summary judgment in Olech cases because proof of his ill will or animus would have eliminated the chance of mistake. In addition, proof of Robbins' ill will or improper motivation would have established a discrimination claim based on pre-Olech traditional Equal Protection theory. See Olech, supra, 528 US at 565-566 (Breyer J., concurring).

Plaintiff's request for discovery should not have been precluded because depositions of Wager (a prospective purchaser of JBF), DeMagistris (another prospective purchaser of JBF), Mitchell (the City Engineer who was Robbins' boss), Lunkenheimer (Robbins' superior in the City Engineering office) and LaPorta (the Mayor) would have established that defendant Robbins had knowledge that JBF had ceased beaming for a period of over one year, and/or that Robbins acted with animus when he denied plaintiff Anderson's request to engage in beaming.

Lacking opportunity to depose the witnesses who spoke with defendant Robbins in regards to granting JBF's request to resume beaming and denying Androme's request to resume beaming, plaintiff could not offer evidence to prove malice or animus.

Plaintiff produced evidence that each of these non-party witnesses were directly involved in Building Inspector Robbins' decision-making to grant JBF's request to beam while denying

Androme's request to beam, and they had conversations with Robbins that were directly relevant to whether Robbins knew that JBF had lost its grandfathered status. The content of Robbins' conversations with these witnesses may have shown that Robbins knew that JBF had lost its grandfathered status to engage in beaming, either through statements Robbins made to the witnesses, or through statements the witnesses made to Robbins in the course of their conversations regarding JBF's requests to "resume" beaming. Additionally, evidence that Robbins knew or was told that JBF had lost its grandfathered status but allowed JBF to resume beaming anyway would be clear evidence of malice.

CONCLUSION

The issue of the degree of similarity plaintiffs must share in order to invoke the "class of one" Equal Protection claim under Olech potentially affects millions of American businesses and individual citizens. The Circuit Courts of Appeals should employ the same standard of similarity to adjudicate these "class of one" claims. The Second Circuit has adopted a test for similarity which requires the plaintiff to prove on a summary judgment motion that the similarities are sufficient to exclude the possibility that the defendant acted on the basis of a mistake. The First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted a standard of similarity between comparators like the standards set forth in the Olech decision, but the Second Circuit has adopted a much more stringent test. "Excluding the possibility of mistake" on a summary judgment

motion is a uniquely high standard which will limit or effectively eliminate Olech type cases within the Second Circuit. For the above-stated reasons, petitioner respectfully requests this Court to grant certiorari.

Respectfully submitted,

/S/

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March 10, 2011

APPENDIX

Opinion of the U.S. Court of Appeals for the Second Circuit.....2a

Decision of the U.S. District Court for the Northern District of New York.....7a

Addendum of Statutes.....24a

GLOVERSVILLE CITY CODE, ZONING CODE, SECTION 300-50, entitled "Discontinuation of use 24a

GLOVERSVILLE CITY CODE, ZONING CODE, SECTION 300-46, entitled "Nonconforming use of land".....24a

GLOVERSVILLE CITY CODE, BUILDING CODE, SECTIONS 102-19(C), entitled "Powers and Duties of Building Inspector".....25a

GLOVERSVILLE CITY CODE, BUILDING CODE, SECTION 102-27(E), entitled "Rules governing permits".....26a

GLOVERSVILLE CITY CODE, PROPERTY MAINTENANCE, SECTION 212-37(G), entitled "Board of Appeals".....27a

10-515-cv
Androme Leather Corp. v. City of Gloversville

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULING BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THE FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of December, two thousand and ten.

PRESENT: WILFRED FINBERG,
BARRINGTON D. PARKER,
RICHARD C. WESLEY,

Circuit Judges.

ANDROME LEATHER CORPORATION,

Plaintiff-Appellant,

-v.-

10-515-cv

CITY OF GLOVERSVILLE, ZONING BOARD OF APPEALS OF THE CITY OF GLOVERSVILLE, D. ROBERT ROBBINS JR., THOMAS RENDA, FRANCES MOSCONI, MARGARET RALBOVSKY, GARRISON SEELOW, DEBORAH ASHE, KELLY OCTIGAN, KAREN SMITH a/k/a KAT, MICHAEL CAPPARELLO, ABRAHAM SEROUSSI, COMMON COUNSIL OF THE CITY OF GLOVERSVILLE, ANTHONY J. CARUSO, MARIE A. SCHULTZ, FRANK A. CLEMENTE, ANTHONY P. CHRISTIANO, PAUL E. REID, MARYLOUISE R. MELE,

Defendants-Appellees.

FOR APPELLANT:
LEWIS B. OLIVER JR., ESQ.,
Oliver Law Office,
Albany, NY

FOR APPELLEES:
PETER G. BARBER, ESQ.,
Murphy, Burns, Barber & Murphy, LLP Albany, NY.

Appeal from the Northern District of New York (Suddaby, J.).

UPON DUE CONSIDERATION, IT IS HERBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED.

Appellant appeals from an order of the United States District Court for the Northern District of New York (Suddaby, J.), which granted summary judgment in favor of the defendants. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

A "class of one" equal protection claim requires the claimant to demonstrate that they share an "extremely high degree of similarity" with the "personal[] to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 114, 159 (2d Cir. 2006) (citations omitted). Further, the claimant must show that:

> (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and differences in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.

Neilson v. D'Angelis, 409 F. 3d 100, 105 (2d Cir. 2005) (citations omitted) (partially abrogated on

other grounds by Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008)).

Here, Appellant differed from its proffered comparator, JBF in at least one important respect. JBF had at one point enjoyed a "grandfathered" right to engage in the process of "beaming," whereas Appellant had never enjoyed such a right and applied to obtain a use variance from the zoning ordinance in question. By itself, this difference raises "the possibility that the defendant acted on the basis of a mistake," negating an essential element of the "class of one" claim rendering appropriate an award of summary judgment for the defendants.

We have considered Appellant's remaining contentions, and find them without merit.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

s/Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ANDROME LEATHER CORPORATION,

Plaintiff,

v.

6:05-CV-0733
(GTS/GHL)

CITY OF GLOVERSVILLE; ZONING BOARD OF APPEALS OF THE CITY OF GLOVERSVILLE; D. ROBERT ROBBINS, JR.; THOMAS RENDA; FRANCES MOSCONNI; MARGARET RALBOVSKY; GARRISON SEELOW; DEBORAH ASHE; KELLY OCTIGAN; KAREN SMITH; MICHAEL CAPPARELLO; ABRAHAM SEROUSSI; COMMON COUNCIL OF CITY OF GLOVERSVILLE; ANTHONY J. CARUSO; MARIE A. SCHUTZ; FRANK A. CLEMENTE; ANTHONY P. CHRISTIANO; PAUL E. REID; and MARY LOUISE R. MELE,

Defendants.

APPEARANCES:
OF COUNSEL:

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HON. GLENN T. SUDDABY, United States District Judge

DECISION and ORDER

Currently before the Court in this civil rights action filed by Androme Leather Corporation ("Plaintiff") is a motion for summary judgment filed by the City of Gloversville ("City"), the Zoning Board of Appeals of the City of Gloversville ("ZAB"), D. Robert Robbins, Jr., Thomas Renda, Frances Mosconni, Margaret Ralbovsky, Garrison Seelow, Deborah Ashe, Kelly Octigan, Karen Smith, Michael Capparello, Abraham Seroussi, Common Council of the City of Gloversville, Anthony J. Carusa, Marie A. Schutz, Frank A. Clemente, Anthony P. Christiano, Paul E. Reid, and Mary Louise R. Mele (collectively, "Defendants"). (Dkt. No. 79.)
For the reasons set forth below, Defendants' motion is granted.

I. BACKGROUND

A. Plaintiff's Claims

Generally, liberally construed, Plaintiff's Complaint alleges that Defendants violated Plaintiff's equal protection rights under the Fourteenth Amendment by selectively, and without

any rational basis, treating Plaintiff differently from other similarly situated individuals (or entities) when Defendants denied Plaintiff's building permit application (or zoning variance) to permit it to add a certain manufacturing process to its plant, while permitting a competitor to engage in the same manufacturing process in its nearby plant. (*See generally* Dkt. No. 1 [Plf.'s Compl.].)[1] Familiarity with the particular factual allegations supporting this claim in Plaintiff's Complaint is assumed in this Decision and Order, which is intended primarily for review by the parties. (*Id.*)

B. Undisputed Material Facts

The following material facts are undisputed by the parties. (*Compare* Dkt. No. 79, Attachment 1 [Defs.' Rule 7.1 Statement] *with* Dkt. No. 90 [Plf.'s Rule 7.1 Response].)

Plaintiff operates a leather processing facility in the City of Gloversville. The leather manufacturing process includes (1) "beaming" (i.e., removing hair from animal hide), (2) "pickling" (i.e., preserving the hide), (3) tanning (i.e., turning hides into preserved pieces of leather using oils and chemicals), (4) coloring (i.e., dying the leather), and (5) finishing (i.e., applying paint to the leather).

Since March 1981, Plaintiff has been engaged in the tanning and finishing of animal hides, but not

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[1] Plaintiff's Complaint also alleges that Defendants violated the Takings Clause of the Fifth Amendment. (Dkt. No. 1.) However, this claim was dismissed by District Judge David N. Hurd in a Decision and Order on November 29, 2005, for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 12.)

beaming. In 1988, the zoning district in which Plaintiff's facility is located was rezoned "M-1." As a result, leather processing (including beaming) was neither permitted nor allowed as a matter of right. However, facilities involved in leather manufacturing before the implementation of the restriction were permitted to continue their "pre-existing nonconforming leather processing uses."[2]

JFB Industries, Inc. ("JFB") is a leather processing facility located in the City of Gloversville, a short distance from Plaintiff, and in the same M-1 zoning district. JFB was established in 1968. Upon establishment, JFB was a full-range leather processing facility, involved in every aspect of the manufacturing process, including beaming.

On October 10, 2000, Plaintiff submitted a building permit application to Defendant D. Robert Robbins, Jr., who was then the City Building Inspector, "to add beaming process to present finishing and tanning plant." On October 12, 2000, Defendant Robbins denied Plaintiff's building permit application on the grounds that leather treatment was not allowed in an M-1 zone. Plaintiff subsequently applied to Defendant ZBA for a review of Defendant Robbins's interpretation of the zoning ordinance and, in the alternative, for a use variance to conduct beaming. Defendant ZBA held hearings on Plaintiff's interpretation appeal and use variance application on December 6, 2000, January 3, 2001, February 7, 2001, and January 2, 2002. In advancing the argument that Plaintiff should be allowed to engage in beaming at ZBA meetings, Plaintiff's President pointed out that JBF, which was located

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[2] (Dkt. No. 1, at ¶¶ 36, 50, 51.)

directly across the street from Plaintiff's plant, was engaged in beaming.

Defendant ZBA ultimately upheld Defendant Robbins's interpretation of the zoning ordinance, and denied Plaintiff's use variance application. Plaintiff subsequently appealed Defendant ZBA's denial of his variance application by filing an Article 78 Proceeding in the Supreme Court of New York, Fulton County. The Supreme Court, followed by the Appellate Division, Third Department, upheld Defendant ZBA's decision. Plaintiff's request to appeal the matter to the New York Court of Appeals was denied.

In September 2004, JFB submitted a request to the Defendant Common Council for a tax installment plan under NYS Real Property Law § 1184. At the Common Council's public meeting, the Common Council approved JFB's tax installment plan upon the finding that it would protect employment for 37 to 50 workers at JFB's facility. Plaintiff never submitted its own request for a tax installment plan.

Familiarity with the remaining undisputed material facts of this action, as well as the disputed material facts, as set forth in the parties' Rule 7.1 Statement and Rule 7.1 Response, is assumed in this Decision and Order, which (again) is intended primarily for review by the parties. (*Id.*)

C. Parties' Arguments on Defendants' Motion for Summary Judgment

1. Defendants' Initial Moving Papers

Generally, in support of their motion for summary judgment, Defendants argue as follows: (1) Plaintiff's "class of one" claim cannot survive summary judgment because Plaintiff has failed to establish either that Plaintiff and JFB had a "high degree of similarity," or that Defendants intentionally treated Plaintiff differently from JFB; (2) Plaintiff has failed to establish that a majority of the members of either the ZBA or the Common Council had an unconstitutional motive for rendering their respective decisions; (3) Plaintiff's official capacity claims lack merit because it is well settled that a claim against an individual in her official capacity is nothing more than a claim against the municipality itself; (4) Plaintiff's claim against the City lacks merit because a municipality cannot be held liable under a theory of *respondeat superior*; and (5) the individual Defendants are protected from liability as a matter of law based on either the doctrine of absolute immunity of the doctrine of qualified immunity. (*See generally* Dkt. No. 79, Attachment 32 [Defs.' Memo. of Law].)

2. Plaintiff's Response

Generally, in its response to Defendants' motion for summary judgment, Plaintiff argues that Defendants' motion should be denied because (1) there is evidence from which a rational factfinder could conclude that Plaintiff and JFB are sufficiently similarly situated, and that Defendants intentionally treated Plaintiff differently from JFB when they denied Plaintiff's request for a beaming variance after granting JFB's request, and (2) Defendants Robbins, ZBA, Seroussi, and City are not entitled to a qualified immunity defense based on the current

record. (*See generally* Dkt. No. 86 [Plf.'s Reply Memo. of Law].)

More specifically, the crux of Plaintiff's argument is that, at approximately the time of its request to engage in beaming, Defendant Robbins, in a letter to a prospective buyer of JFB inquiring as to whether JFB would be permitted to "resume" beaming, indicated that JFB had a "grandfathered" right to continue beaming as long as it did not cease beaming for more than one year after it was deemed exempt from the zoning restriction. (*Id.* at 8.) Plaintiff argues that Defendant Robbins knew when he wrote this letter that JFB had previously gone more than a year without beaming, and therefore, JFB had lost its grandfathered right to beam. (*Id.* at 8-11.) As a result, Plaintiff argues that, by informing a potential purchaser that JFB had the right to continue beaming, and by not requiring JFB to undergo the same application process as Plaintiff, Defendant Robbins intentionally treated the similarly situated leather-manufacturing facilities differently. (*Id.* at 8-11.)

3. Defendants' Reply

Generally, in their reply to Plaintiff's response, Defendants argue as follows: (1) the claims against Defendants Robbins, ZBA, the Common Council, Seroussi and the City lack merit; and (2) the individual Defendants are entitled to immunity. (*See generally* Dkt. No. 92 [Defs.' Reply Memo. of Law].)

II. RELEVANT LEGAL STANDARDS

A. Legal Standard Governing Motions for Summary Judgment

Because the parties to this action have demonstrated, in their memoranda of law, an accurate understanding of the legal standard governing motions for summary judgment, the Court will not recite that well-known legal standard in this Decision and Order, but will direct the reader to the Court's recent decision in *Pitts v. Onondaga County Sheriff's Dep't*, 04-CV-0828, 2009 WL 3165551, at *2-3 (N.D.N.Y. Sept. 29, 2009) (Suddaby, J.), which accurately recites that legal standard.

B. Legal Standards Governing Plaintiff's Claims

Because the parties to this action have demonstrated, in their memoranda of law, an accurate understanding of the relevant points of law contained in the legal standards governing Plaintiff's claims in this action, the Court will not recite, in their entirety, those legal standards in this Decision and Order, which (again) is intended primarily for review by the parties. (*See* Dkt. No. 79, Attachment 32 [Defs.' Memo. of Law]; Dkt. No. 86 [Plf.'s Reply Memo. of Law]; Dkt. No. 92 [Defs.' Reply Memo. of Law].)

III. ANALYSIS

Based on a careful reading of the parties' motion papers, the Court finds it appropriate to address the following three issues in order to decide Defendants' motion: (1) whether Plaintiff and JFB

had a "high degree of similarity"; (2) whether Defendants intentionally treated Plaintiff differently from JFB out of malice or with no rational basis; and (3) whether Plaintiff's claims against the Common Council lack merit on alternative grounds.

A. Whether Plaintiff and JFB Had a "High Degree of Similarity"

As indicated above in Part I.C.1. of this Decision and Order, Defendants argue that JFB and Plaintiff did not have the threshold "high degree of similarity" required for Plaintiff's equal protection claim to survive summary judgment. Based on the current record, the Court accepts Defendants' argument for three reasons.

First, although Plaintiff and JFB are leather-manufacturing companies located in the same zoning district, unlike JFB, Plaintif had never engaged in beaming prior to the 1988 rezoning of the district in which its facility was located. As a result, while Plaintiff was required to obtain permission from the City Building Inspector before it could begin beaming, JFB was required only to beam once a year in order to retain its right to continue beaming.

Second, and relatedly, because JFB had a "grandfathered" right to beam, it was up to the City Inspector to determine whether JFB had forfeited that right. In making this determination, the Zoning Code did not require the City Inspector to investigate the facility. Therefore, unless the City Inspector had reason to believe that JFB was not beaming, the inspector was afforded a degree of discretion to assume that JFB maintained its beaming operation. Conversely, because Plaintiff requested permission to beam for the first time after

its district was re-zoned, Plaintiff was required to apply for a permit to restructure its interior (to be able to beam). In addition, and because Plaintiff's permit request was denied, Plaintiff was required to apply for a variance. In its variance application, Plaintiff was required to provide evidence "that applicable zoning regulations and restrictions have caused unnecessary hardship." Under these circumstances, neither the City Inspector nor the ZAB was afforded discretion to assume that Plaintiff was entitled to beam; rather, Plaintiff had the burden of establishing its entitlement to beam.

Third, even assuming that JFB did not beam for more than a year (thus requiring JFB to forfeit its grandfathered right to beam and re-apply with the City Inspector for the right to beam), there is no admissible record evidence establishing that Plaintiff and JFB were financially similar. Indeed, the available record evidence indicates that Plaintiff was denied its variance, not because it was requesting permission to beam for the first time after its district was re-zoned, but because in its application, Plaintiff's financials reflected that it was operating at a profit absent beaming. Stated another way, Plaintiff has failed to introduce any admissible record evidence establishing that JFB was operating at a profit during the time period in which it was allegedly not beaming, such that JFB would have been denied a variance had it been required to apply for one.

For these reasons, Plaintiff's equal protection claim is dismissed.

B. Whether Defendants Intentionally Treated Plaintiff Differently From

JFB Out of Malice or With No Rational Basis

Even assuming that Plaintiff and JFB had a high degree of similarity, Plaintiff's equal protection claim survives summary judgment only if Plaintiff also demonstrates that Defendants intentionally treated Plaintiff and JFB differently, either out of malice or with no rational basis. *Spiegel v. Adirondack Park Agency*, 06-CV-0203, 2009 WL 3049720, at *8 (N.D.N.Y. Sept. 18, 2009) (Sessions, J.); *Assoko v. City of New York*, 539 F. Supp.2d 728, 735 (S.D.N.Y. 2008) ("In the Second Circuit, to state a 'class of one' claim under *Olech*, Plaintiffs must allege: (1) that they were intentionally treated differently from other similarly situated individuals; and (2) that the disparate treatment was either (a) 'irrational and wholly arbitrary' or (b) motivated by animus.").

1. **Whether Plaintiff Was Intentionally Treated Differently From JFB**

tion[]s is generally a prerequisite for intentionally different treatment." *Spiegel*, 2009 WL 3049720, at *8 (citing *LaTrieste Rest. v. Vill. of Port Chester*, 188 F.3d 65, 69-70 [2d Cir. 1999]). Accordingly, "[a] mere failure to pursue other violations is not a basis for a selective prosecution claim." *Id.* (citation omitted). Having said that, evidence that a City Inspector consciously chose not to investigate or pursue a zoning violation by one individual, while choosing to investigate zoning violations by other similarly situated individuals could establish selective treatment. *See Spiegel*, 2009 WL 3049720, at *8

(finding that, where a park agency found a homeowner constructing a home to be in violation of certain development permits, evidence of the park agency's conscious decision not to investigate potential permit violations by other similarly situated homeowners "could establish that [plaintiffs] were treated selectively").

Here, Plaintiff has introduced admissible record evidence from which a rational factfinder could conclude that Defendant Robbins (1) was aware that JFB was not beaming for more than a year, and (2) failed to investigate this fact. However, Plaintiff has failed to introduce admissible record evidence establishing that, while consciously choosing not to investigate JFB for an existing zoning violation, Defendant Robbins found Plaintiff (or another similarly situated leather manufacturer) to be in violation of a particular zoning rule. Instead, Plaintiff tenuously argues that, while consciously choosing not to investigate JFB, Defendant Robbins denied Plaintiff's request for a permit to restructure the interior of its facility. Such an argument is without merit because it fails to consider the undisputed fact that, in denying Plaintiff's request, Defendant Robbins did not investigate Plaintiff for an existing zoning violation (or even act spontaneously).[3] Rather, the available record evidence indicates that Plaintiff sought Defendant Robbins's permission to begin beaming, and that, in

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[3] The Court notes that the ZAB considered Plaintiff's variance request only after Defendant Robbins denied the request, and the ZAB never considered any facts regarding JFB. Because the ZAB did not in any way rule on any behavior on the part of JFB, it cannot be rationally concluded that the ZAB even compared Plaintiff and JFB, let alone intentionally treated them differently.

responding to that request for permission, Defendant Robbins considered whether granting such permission would cause Plaintiff to violate the City's zoning ordinances. Based on these limited facts, the Court finds that Plaintiff has failed to establish that it was intentionally treated differently from JFB.

2. Whether the Disparate Treatment Was Irrational and Wholly Arbitrary

"In the zoning context, a government decision regulating a landowner's use of his property offends substantive due process if the government action is arbitrary or irrational." *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 102 (2d Cir. 1992) (citations omitted). "A zoning board's decision can be considered irrational only when the board acts 'with no legitimate reason for its decision.'" *Harlen Assocs. v. Inc. Village of Mineola,* 273 F.3d 494, 500 (2d Cir. 2001) (holding that a zoning board's denial of special use permit for consruction of a convenient store was rational because it was based on traffic concerns and concern for the safety of children at a nearby school) (citations omitted). Moreover, "a municipal zoning ordinance is [generally] presumed [to] be valid, and will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective." *Greene v. Town of Blooming Grove*, 879 F.2d 1061, 1063 (2d Cir. 1989) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 [1985]). "In applying th[e]se principles . . . ,defendants' subjective motivation in enacting the [restriction] is irrelevant." *Ecogen, LLC v. Town of Italy*, 438 F. Supp.2d 149, 157 (W.D.N.Y. 2006) (citations omitted). As a result,

"[i]n order to prevail on its substantive due process claim, [Plaintiff] must establish that the [restriction], at least insofar as it prohibits [Plaintiff] construction of a [beaming station], bears no rational relationship to any legitimate governmental purpose." *Ecogen, LLC*, 438 F. Supp.2d at 157.

As an initial matter, the re-zoning of Plaintiff's district, *inter alia*, prohibited the development of new, and expansion of existing, leather-processing facilities. Although the parties do not challenge the legitimacy of the re-zoning of Plaintiff's district, it is clear to the Court, based on the current record, that the re-zoning was rationally related to the City's legitimate goal of reducing odors and pollutants that are emitted from leather-manufacturing facilities.

Based on the current record (and the legitimacy of the re-zoning of Plaintiff's district), the Court finds that it cannot be rationally concluded that Plaintiff was arbitrarily denied (1) a permit to restructure its interior, or (2) a variance. Defendant Robbins denied Plaintiff's request for a permit to restructure the interior of its facility because such restructuring would extend the scope of Plaintiff's permitted nonconforming manufacturing facility, in violation of the zoning code. The ZAB upheld Defendant Robbins's denial of the permit request for the same reasons that Defendant Robbins denied the request. In addition, the ZAB denied Plaintiff's request for a variance because Plaintiff was unable to demonstrate the requisite undue financial burden associated with not being granted the variance. Moreover, the ZAB's denial of Plaintiff's variance request was upheld by a New York State Supreme Court and the Appellate Division, who expressly

stated that it was rational for the ZAB to deny Plaintiff's request based on the financial information that Plaintiff presented to the ZAB.

As a result, even assuming that the Court could conclude that Defendant Robbins intentionally treated JFB differently from Plaintiff, the Court concludes that Plaintiff has failed to introduce admissible record evidence establishing that it was irrational and wholly arbitrary for (1) Defendant Robbins to (a) deny Plaintiff's permit request, and (b) not investigate JFB's facility,[4] and (2) the ZAB to subsequently affirm Defendant Robbins's denial of the permit request and deny Plaintiff's variance application.

3. Whether the Disparate Treatment Was Motivated By Personal Animus

"The branch of equal protection law that protects individuals from unequal treatment motivated by 'malicious or bad faith intent to injure' provides protection from adverse governmental action that is not motivated by 'legitimate governmental objectives.'" *Bizzarro v. Miranda*, 394

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[4] "Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection." *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980); *accord*, *Spiegel*, 2009 WL 3049720, at *13 (finding that the park agency did not act irrationally when it chose to bring an enforcement action against the plaintiffs, and not other homeowners who may have been in violation of the development permit because, regardless of the conduct of the other homeowners, the plaintiffs home construction violated development permits, and the agency's "conduct [in initiating an enforcement action] was rationally related to the work of the [a]gency to regulate development in the Adirondack Park region").

F.3d 82, 87 (2d Cir. 2005) (quoting *Esmail v. Macrane*, 53 F.3d 176, 180 [7th Cir. 1995]). "This standard must be scrupulously met; a reasonable jury must be able to conclude that Defendants'] action w[ere] a spiteful effort to get [Plaintiff] for reasons wholly unrelated to any legitimate state objective." *Spiegel*, 2009 WL 3049720, at *9 (internal quotation marks and citations omitted).

Here, Plaintiff has failed to even speculate, let alone introduce admissible record evidence establishing, that either Defendant Robbins, Defendant ZAB, or any individual on the ZAB acted out of personal dislike for Plaintiff in denying Plaintiff's permit and variance requests. As a result, the Court finds that Plaintiff has failed to introduce admissible record evidence of impermissible motive.

For these alternative reasons, Plaintiff's equal protection claim is dismissed.

C. Whether Plaintiff's Claims Against the Common Council Lack Merit on Alternative Grounds

In its memorandum of law, Plaintiff fails to address Defendants' argument that, because the Common Council members were not personally involved in prohibiting Plaintiff's beaming operations, the claims against them must fail as a matter of law. In addition, Plaintiff fails to address Defendants' argument that the Common Council's decision to grant JBF's tax-abatement plan was in the City's best interests, and does not amount to an unconstitutional violation of Plaintiff's equal protection rights. As a result, Defendants' burden with regard to the dismissal of Plaintiff's claims

against the Common Council and its members is lightened such that, in order to succeed on this request, Defendants need show only that their request has facial merit.[5]

Based on their motion papers, the Court finds that Defendants have met this lightened burden. In any event, the Court finds that Defendants' argument would survive the heightened scrutiny appropriate on a contested motion for the reasons stated in Defendants' memorandum of law. (*See* Dkt. No. 79, Attachment 32, at 17-34.)

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[5] *See* N.D.N.Y. L.R. 7.1(b)(3) ("Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as this Rule requires shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown."); *Rusyniak v. Gensini*, 07-CV-0279, 2009 WL 3672105, at *1 n.1 (N.D.N.Y. Oct. 30, 2009) (Suddaby, J.) (citing cases that stand for the proposition that, where plaintiffs do not respond to defendants' argument made in their summary judgment motion, plaintiffs are deemed to have consented to defendants' argument, and thus defendants must only satisfy their "modest threshold burden" of demonstrating entitlement to the relief requested in their motion for summary judgment); *accord, Cossey v. David*, 04-CV-1501, 2007 WL 3171819, at *4 & nn. 21, 22 (N.D.N.Y. Oct. 29, 2007) (Lowe, M.J. adopted by Scullin, J.) (collecting cases); *Niles v. Nelson*, 72 F. Supp.2d 13 (N.D.N.Y. 1999) (McAvoy, J.) (holding that when a party does not respond to a portion of the opposing party's motion, they indicate that they consent to the granting of summary judgment with respect to that portion of the motion or have abandoned the claim); *cf. Di Giovanna v. Beth Isr. Med. Ctr.*, 08-CV-2750, 2009 WL 2870880, at *10 n.108 (S.D.N.Y. Sept. 8, 2009) (citing cases for proposition that plaintiff's failure to respond to argument made in summary judgment motion as to why certain claim should be dismissed constitutes abandonment of claim).

As a result, Plaintiff's claims against the Common Council and its members are dismissed on these alternative grounds.

D. Whether Defendants Are Entitled to Immunity

Defendants argue that they are entitled to immunity from liability (whether it the immunity be qualified or absolute in nature) regarding Plaintiff's claims. Because the Court has already determined that Plaintiff's equal protection claims cannot survive summary judgment, the Court need not, and does not, address Defendants' immunity argument (or any other arguments not addressed in this Decision and Order, e.g., Defendants' official-capacity argument, and its *respondeat superior* argument).

ACCORDINGLY, it is

ORDERED that Defendants' motion for summary judgment (Dkt. No. 79) is **GRANTED**; and it is further

ORDERED that Plaintiff's Complaint (Dkt. No. 1) is **DISMISSED**.

Dated: January 14, 2010
Syracuse, New York

/S/
Hon. Glenn T. Suddaby
U.S. District Judge

GLOVERSVILLE CITY CODE, ZONING CODE, SECTION 300-50, entitled "Discontinuation of use":

> "A nonconforming use of a building or structure or any portion thereof which is discontinued for a period of 12 consecutive months shall not be reestablished, and any subsequent use shall conform to the use regulations of the district in which the premises is located. A use shall be deemed to have been discontinued under any of the following conditions:
>
> A. Vacancy of a nonconforming use building or discontinuance of a nonconforming use for a period of 12 consecutive months.
>
> B. Manifestation of a clear intent on the part of the owner to abandon the nonconforming use."

[A-832; Gloversville City Code, Chapter 300, Zoning, Article XI Nonconforming Uses, Section 300-50 entitled "Discontinuance of use"]

GLOVERSVILLE CITY CODE, ZONING CODE, SECTION 300-46, entitled "Nonconforming use of land":

> "The nonconforming use of land shall not be enlarged or extended beyond the area of land occupied by such use at the time of the

adoption of this chapter. A nonconforming use of land may not be moved in whole or in part to any other portion of the lot or parcel of land occupied by such nonconforming use at the time of adoption of this chapter. A nonconforming use of land shall not be changed to another nonconforming use. If a nonconforming use of land is discontinued for a period of 12 consecutive months, it shall not be renewed, and any subsequent use of the land shall conform to the regulations of the district in which the land is located."

[A-831; Gloversville City Code, Chapter 300, Zoning, Article XI Nonconforming Uses, Section 300-46 entitled "Nonconforming use of land"]

GLOVERSVILLE CITY CODE, BUILDING CODE, SECTIONS 102-19(C), entitled "Powers and Duties of Building Inspector":

"The Building Inspector shall... examine the premises for which such applications have been received, plans have been approved or such permits has been issued for the purpose of ensuring compliance with laws, ordinances, rule and regulations..."

[A-777; Gloversville City Code, Chapter 102 Building Construction and Fire Prevention, Article II Building Construction Code, Section 102-19(c) entitled "Powers and Duties of Building Inspector"]

GLOVERSVILLE CITY CODE, BUILDING CODE, SECTION 102-27(E), entitled "Rules governing permits":

> "E. Rule No. 5: Revocation of a permit. The code enforcement official may revoke a permit theretofore issued in the following instances:
>
> (1) Where he finds that there has been any false statement or misrepresentation as to a material fact in the application, plans or specifications on which the permit was based.
>
> (2) Where he finds that the permit was issued in error and should not have been issued in accordance with the applicable law.
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> (3) Where he finds that the work performed under the permit is not being prosecuted in accordance with the provisions of the application, plans or specifications.
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> (4) Where the person to whom a permit has been issued fails or refuses to comply with a stop order issued by the code enforcement official.
>
> (5) Where the property for which the permit was issued changes ownership.

[A-783; Gloversville City Code, Chapter 102 Building Construction and Fire Prevention, Article II Building Construction Code, Section 102-27(E) entitled "Rules governing permits"]

GLOVERSVILLE CITY CODE, PROPERTY MAINTENANCE, SECTION 212-37(G), entitled "Board of Appeals":

> "The Board of Appeals shall have the following powers and duties prescribed by statute and by this chapter:
>
> (1) Interpretation: on appeal from a determination of an Enforcement Officer, to hear and decide on questions where it is alleged there is an error in any order, requirement, decision or determination made by the Enforcement Officer involving the interpretation of any provisions of this chapter."

[A-768, Chapter 212: Property Maintenance, Article VII Administration and Enforcement, Section 212-37(G) entitled "Board of Appeals"]